Supreme Court, U.S.
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No. 97-868

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

NACCO INDUSTRIES, INC.,

*Petitioner*,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

*Respondent*.

**On Petition for a Writ of Certiorari to the Supreme Court of Ohio**

## REPLY OF THE PETITIONER

TIMOTHY B. DYK
*(Counsel of Record)*
GREGORY A. CASTANIAS
PAUL R. REICHERT
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

CHARLES M. STEINES
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

*Counsel for Petitioner*

## REPLY OF THE PETITIONER

Nothing in the Respondent's Brief in Opposition ("Opp.") diminishes either the conflict between the decision below and this Court's precedents or the importance of this case.

1. Respondent's claim that the petition presents issues insufficiently important for certiorari cannot be squared with the views of the United States ("U.S. Br.") that the petition presents issues "of broad recurring importance" (U.S. Br. 11); the views of *amicus curiae* the Bond Market Association ("BMA Br.") that "certiorari should be granted to uphold the important constitutional interest" at stake in this case (BMA Br. 6); or the views of the Committee on State Taxation ("COST Br.") that the Ohio Supreme Court's decision "dramatically limit[s] the reach of both the statutory and constitutional intergovernmental tax immunity doctrines" (COST Br. 4).

2. Respondent's brief in opposition barely touches upon NACCO's argument that the Ohio tax violates the constitutional doctrine of intergovernmental immunity (*see* Pet. 16-20). Indeed, neither Respondent's restatement of the questions presented (Opp. i), nor his arguments, responds to NACCO's showing that the decision below conflicts with this Court's intergovernmental tax immunity decisions, most notably *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983). As NACCO showed in the Petition, Ohio's clear and admitted differential taxation of gain from the sale of federal and state obligations "impermissibly discriminates" against federal obligations. *Id.* at 397. That is the position of the United States (U.S. Br. 6-11), as well as the other *amici* (BMA Br. 6-8; COST Br. 3-7); indeed, the existence of this discrimination was even acknowledged by the Ohio Supreme Court below (Pet. App. 10a).

3. Respondent's defense to NACCO's showing of impermissible discrimination is limited to arguing that the decision below rests on an unreviewable "factual finding" (Opp. 3). As NACCO explained in the Petition (Pet. 18-20), and as the Solicitor General has reiterated in his brief (U.S. Br. 8-10), the Ohio court erred as a matter of law by announcing a new rule of law that requires taxpayers to prove not only the existence of discrimination, but

also that the discrimination "affects or impedes a function of the federal government" (Pet. App. 10a). Of course, discrimination against federal obligations perforce "impedes" the marketability of federal obligations; this Court's decisions have never imposed the further requirement that complex factual economic proof be presented to sustain such a discrimination claim or a requirement that the overall impact of the tax be evaluated. As the Solicitor General properly notes, "there is no authority for the [Ohio] court's proposition that an established discrimination against a holder of federal property may be permitted because of the speculative possibility that a compensating advantage might exist elsewhere in the state tax scheme in some other year or for some other holder of federal property" (U.S. Br. 9).

Indeed, as noted by the United States (U.S. Br. 7-8), this Court's decisions cannot possibly be read to support that proposition. The two cases relied upon by the Ohio Supreme Court — *Willcuts v. Bunn*, 282 U.S. 216 (1931) and *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182 (1987) — both involved *nondiscriminatory* taxes. In those circumstances, where state and federal obligations were treated evenly, it was quite proper for the Court to require a showing of actual interference with the marketing of federal securities in order to strike down the tax. As has been explained previously by petitioner and all *amici* (Pet. 16-17 & n.8; U.S. Br. 7-8 & n.5; BMA Br. 17-19; COST Br. 7 & n.2), the issue of discrimination is quite different than, and analytically distinct from, the question of whether a state tax actually interferes with the borrowing power of the United States. No showing of interference is required where the tax is discriminatory.

4. NACCO also showed in the Petition (Pet. 10-16) that the Ohio Supreme Court's decision rests upon a fundamental misinterpretation of 31 U.S.C. § 3124(a), and conflicts with this Court's decisions interpreting that statute — most notably *Nebraska Department of Revenue v. Loewenstein*, 513 U.S. 123 (1994). As NACCO showed (Pet. 10-16), and as the Solicitor

General has explained (U.S. Br. 8 n.5), this Court's decision in *Loewenstein* cannot remotely support the decision below.[1]

In response, Respondent simply reiterates the misguided application of the "negative pregnant" canon of statutory construction relied upon by the court below (Pet. App. 4a-5a). Respondent's argument leads only to absurd conclusions. Respondent claims (Opp. 9-10) that because Congress in section 3124(b) used the term "gain and loss from the disposition of those obligations and evidences of ownership," section 3124(a) (which does not contain that phrase) must not prohibit state taxation of "gain and loss from the disposition of those obligations." Section 3124(b), of course, also uses the term "dividends, earnings, or other income from evidences of ownership issued by the Government," but section 3124(a) does not contain this language. Thus, if carried to its logical end, Respondent's "negative pregnant" argument would lead to the conclusion that state taxation of "dividends, earnings, or other income" would also not be prohibited by section 3124(a). That is clearly not the case. *See, e.g., American Bank & Trust Co. v. Dallas County,* 463 U.S. 855 (1983) (striking down, under predecessor to section 3124(a), state tax on bank earnings).

5. Respondent totally fails to reconcile the Ohio Supreme Court's approval of a state tax on "gain" — defined by *Black's Law Dictionary* (at 678 (6th ed. 1990)) as "[a]ppreciation in value or worth" — with this Court's repeated statements that an obligation is "considered" for purposes of section 3124(a) "when its *value* is 'taken into account, or included in the accounting,' in computing the taxable value of a taxpayer's assets or net worth." *Loewenstein,* 513 U.S. at 128-29 (emphasis added); *American Bank & Trust Co.,* 463 U.S. at 862; *see* Pet. 12. Respondent

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[1] Respondent's efforts to diminish the importance of *Loewenstein* to the Ohio Supreme Court's decision (Opp. 6-7) cannot be reconciled with the Ohio Supreme Court's erroneous view that "the dispositive question in this case" is "simila[r]" to that presented in *Loewenstein* (Pet. App. 5a).

offers no explanation for this obvious conflict between the Ohio court's statutory construction and this Court's decisions interpreting section 3124(a).

6. Finally, Respondent's suggestion (Opp. 12) that "further development" is needed in this area is unsupported and unsupportable — Ohio's highest court has now definitively spoken on this issue, so "further development" cannot possibly take place with respect to the Ohio statute. Discrimination against federal obligations also exists under the tax structures of Connecticut and Kansas (Pet. 21; BMA Br. 5), and the Ohio decision will encourage further discriminatory legislation.

This Court should not await further discrimination or litigation which cannot possibly affect the situation in Ohio. The Ohio Supreme Court's approval of discrimination against federal obligations also has the potential to cause a huge increase in the Federal Government's cost of borrowing (BMA Br. 8 & n.6). As the Solicitor General has stated (U.S. Br. 11), this holding "interferes with the extraordinarily important federal function of marketing trillions of dollars of United States obligations." Similarly, the Bond Market Association has concluded that even a slight tax burden affecting the disposition of federal obligations in the secondary market could "result in wider spreads and impair the price efficiency and liquidity essential to the smooth operation of the secondary market" for federal obligations (BMA Br. 8).

## CONCLUSION

For the foregoing reasons and those stated in the petition, certiorari should be granted.

Respectfully submitted,

TIMOTHY B. DYK
*(Counsel of Record)*
GREGORY A. CASTANIAS
PAUL R. REICHERT
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

CHARLES M. STEINES
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

*Counsel for Petitioner*

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